STATE OF MICHIGAN
IN THE SUPREME COURT

JOYCE McDOWELL, A Formal Special Personal Representative of the Estate of BLAKE BROWN, Deceased, JOYCE BROWN, Deceased, CHRISTOPHER BROWN, Deceased, NAOMI FISH, Deceased, JOHNNY C. FISH, Deceased, JERMAINE FISH, Deceased, as Special Conservator of JONATHAN FISH, a Minor and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, Adults, Plaintiffs-Appellees, v CITY OF DETROIT, Individually and Acting By and Through the DETROIT HOUSING COMMISSION, Defendants-Appellants. /	Supreme Court No. 127660 Court of Appeals No. 246294 Wayne County Circuit Court No. 00-039668-NO

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I. IS NEGLIGENT NUISANCE AN EXCEPTION TO GOVERNMENTAL IMMUNITY.

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiffs-Appellees contend the answer should be, "Yes".

Defendants-Appellants contend the answer should be, "No".

II. WILL THE FACTS ALLEGED IN THE INSTANT CASE SUPPORT A CLAIM OF TRESPASS-NUISANCE?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends the answer should be, "Yes".

Defendants-Appellants contend the answer should be, "No".

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INTRODUCTION

Defendants file this brief pursuant to this Court's order of September 23, 2005, for the dual purposes of supplementing their Application for Leave To Appeal and replying to Plaintiffs' response thereto.

I. NEGLIGENT NUISANCE IS NOT AN EXCEPTION TO GOVERNMENTAL IMMUNITY.

As was the case in the Court of Appeals, at no point in their response to this issue do Plaintiffs argue that this Court's decision in Hadfield v Oakland County Drain Commissioners, 430 Mich 139 (1988), recognized negligent nuisance-in-fact as an exception to the governmental immunity bestowed by MCL 691.1407. In fact, at no point do Plaintiffs even discuss Hadfield or the opinions in Rosario v City of Lansing, 403 Mich 124 (1978), and Gerzeski v State Highway Department, 403 Mich 149 (1978), which also refused to recognize negligent nuisance-in-fact as an exception to governmental immunity. Moreover, the points raised by Plaintiffs in their response to Defendants' application to this Court do not even address the issue.

The fact that Plaintiffs invoke certain statutory violations as the basis of their nuisance claim (Plaintiffs' Response, p 8-9) does not render that claim an exception to governmental immunity, nor do Plaintiffs even attempt to explain why such a conclusion should be drawn.

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It is also worth noting that Plaintiffs do not even demonstrate that the statutes that they invoke give rise to a private cause of action. See Long v Chelsea Community Hospital, 219 Mich 578, 583 (1986). Even if they did, those statutes evince no legislative intent to abrogate governmental tort immunity. See Ballard v Ypsilanti Township, 457 Mich 564, 574 (1988).

Plaintiffs' citation to this Court's decision in Soupal v Shady View, Inc, 469 Mich 458 (2003), likewise adds nothing to the analysis. Soupal involved an action to abate a nuisance, not a tort claim. In Hadfield -- which governs this case -- this Court questioned whether such cases are even relevant to the present inquiry. 430 Mich at 174 n 15. In Lee v Feldt (After Second Remand), 439 Mich 457 (1992), the importance of that distinction was expressly recognized:

> "The distinction between the government's liability for prospective equitable relief and its liability for retrospective damages or compensation, and the principle that the former kind of liability is generally not barred by sovereign immunity, are fundamental to sovereign immunity law."

Id. at 469 (Cavanagh, J.).

In short, Plaintiffs are represented by highly competent appellate counsel. If there were any tenable response to the analysis set forth in Issue I. of Defendants' application to this Court, we would have seen it ere now.

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II. AS A MATTER OF LAW, THE FACTS ALLEGED IN THE INSTANT CASE WILL NOT SUPPORT A CLAIM OF TRESPASS-NUISANCE BECAUSE THE FIRE STARTED ON THE TENANT'S PREMISES.

The only question here is whether there was a physical intrusion into the demised premises. That, in turn, depends on whether the interstitial space between the outer and inner walls is part of the demised premises. In their application, Defendants demonstrated that both the outer and inner walls are part of the demised premises as a matter of law, and that it necessarily followed that the interstitial space was included in the demised premises.

Plaintiffs' response is a classic exercise in misdirection.

The first six pages of Plaintiffs' discussion (Plaintiffs' Response, p 10-15) do not even address the issue. Instead, Plaintiffs discuss two cases in which the question of physical intrusion onto the plaintiff's property was not an issue. Continential Paper v City of Detroit, 451 Mich 162 (1996) (physical intrusion, but not from the defendant's property -- no liability); Buckeye Union Fire Ins Co v State of Michigan, 383 Mich 630 (1970) (physical intrusion from defendant's property -- liability). That discussion begs the question whether Defendants in the instant case were in possession of the interstitial space within the demises premises.

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When Plaintiffs do get around to discussing that question, they resort to an equally inapposite line of cases. Plaintiffs invoke the common law exception to the general rule of landlord nonliability for the condition of the leases premises:

> "As a general rule the owner of a building who has leased such building to another without any agreement to repair is not liable to a tenant or to his invitees for injuries sustained by reason of its unsafe condition. [Citations omitted]. However, this rule does not apply where the owner reserves control of a portion of the premises for use in common by himself and the tenants, or by different tenants. [Citations omitted]. . . . Exceptions to the general rule are most often found in cases where injuries occur in the use of stairways, hallways, and elevators where either the owner has control or the owner and the tenant have joint control."

Boe v Healy, 84 SD 155; 168 NW2d 710, 712 (1969). Boe involved a fire which originated in the basement of a multi-dwelling building, which was a common area. 168 NW2d at 711.

In Horvath v Burt, 98 Nev 186; 643 P2d 1229 (1982), there was no issue as to who controlled the area in the multi-unit building in which the fire started. Id. at 1230-31. The court merely held (in pertinent part) that the landlord was not relieved of his statutory duty to maintain the electrical wiring because of its location in an inconvenient place under the building. Id. at 1231.

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In Leavitt v Glick Reality Corp, 362 Mass 370; 285 NE2d 786 (1972), the court held that the landlord was in control of the wiring in the ceiling of a multi-tenant building. Id. at 788-89.

The conceptual flaw in citing these cases is that doing so confuses the elements necessary to liability with the elements necessary to an exception to statutory immunity from such liability. There is no question but that in the absence of Michigan's governmental immunity statute, Plaintiffs would have a jury submissible case. But that is not the issue here. Rather, the question is whether the circumstances of the instant case constitute a trespass-nuisance, which in turns depends upon whether Defendants were in possession of the interstitial space **within the meaning of that exception to governmental immunity**.

Otherwise stated, the type of control necessary to establish liability is not the same as the degree of control necessary to establish that Defendants were in possession of the area in question so as to allow the conclusion that the fire spread from Defendants' property to Plaintiffs'.

For reasons set forth in Defendants' application, as a matter of law the interstitial space was part of the demises premises. Whether there was sufficient "retained control" to impose liability in the absence of immunity is simply irrelevant.

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Moreover, even Plaintiffs' characterization of the principles they invoke is inaccurate. In landlord/tenant situations, the degree of retained control necessary to impose a duty on the landlord is governed by the intent of the landlord to exercise the kind of control set forth in §328E of the Restatement. DeLeon v Creeley, 972 SW2d 808, 812 (Tex App 1998). That provision reads as follows:

> "A possessor of land is
>
> "(a) a person who is in occupation of the land within intent to control it or
>
> "(b) a person who has been in occupation of land within intent to control it, if no other person has subsequently occupied it within intent to control it, or
>
> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

Restatement, Torts (2d), §328E.

The commentary informs us that the "possession" defined by §328E is not the formalistic type premised on legal relations, but rather is "possession" in the real-world factual sense.

> "'Possession' has been given various meanings in the law, and the term frequently is used to denote the legal relations resulting from facts, rather than in the sense of describing the facts themselves. It is used here strictly in the factual sense, because it has been so used in almost all tort cases."

Id., Comment a.

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The Prosser hornbook underscores that point by emphasizing that a landlord's retention of the right to enter in limited circumstances does not amount to the type of control sufficient to trigger landlord liability.

> "A variety of ingenious theories have been advanced in support of this liability. **An older, popular one is that under the agreement to repair the lessor retains the privilege to enter and supervise the control of the property, and so is 'control' of it**, and therefore subject to the same duties as an occupier. On this basis a few courts have held them liable to persons outside of the premises where he merely reserves the right to enter and repair, without obligating himself to do so; but as to persons on the land most of the courts have refused to go so far. **It seems obvious that the lessor's 'control,' even under a convenant, is a fiction devised to meet the case, since he has no power to exclude any one, or to direct the use of the land, and it is difficult to see how his privilege to enter differs in any significant respect from that of any carpenter hired to do the work**."

Prosser & Keaton on Torts (5th ed) (West 1984), §63, p 444 (emphasis added).

The Rhode Island Supreme Court rejected a plaintiff's attempt to invoke "retained control" liability on the basis of a lease requiring the landlord to keep the exterior in repair and to replace broken windows. Rejecting the claim of a woman injured by a defective window fixture, the court cited Prosser and said:

> "We too reject the fiction that a covenant to repair in and of itself and without something more constitutes such a reservation of control so as impose

upon defendant liability for the injuries sustained by plaintiff."

Monti v Leand, 108 RI 718; 279 A2d 743, 745 (1971). See also Chambers v Buettner, 295 Ala 8, 321 So2d 650 (1975) (no evidence that landlord retained control of area where electrical conduit located); Gilbreath v J H Greenwalt, 88 Ill App 3d 308, 410 NE2d 539 (1980) (lessor not generally liable for injuries resulting from defective conditions where premises are wholly demised).

In the instant case, it is undisputed that the premises were completely demised. (Appendix A, p 14, ¶V.). ("Resident . . . shall have the exclusive right to occupy the leased premises".) The sole basis for the Court of Appeals' finding of retained "control" of the interstitial space were provisions in the lease in which Defendants retained under the agreement to repair the "privilege to enter and supervise the condition of the property". That would be insufficient even to impose liability under the common law theory invoked by Plaintiffs in the cases they cite. It cannot rationally be found sufficient to impose liability for **trespass**-nuisance based upon Defendants' purported occupancy of the interstitial space.

Furthermore, Plaintiffs fail to address the fact that their claims rest upon an assertion that the fire originated not just in the interstitial wall space, but *inside the tenant's electri-*

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cal outlet. (Plaintiffs' Response, p. 4-5) Plaintiffs' electrical expert Daniel Churchward has opined that the fire began due to arcing inside the outlet, and traveled out of the outlet and into the interstitial wall space. (Plaintiffs' Exhibit 5, p. 42-3, 46-8).

Even assuming *arguendo* that the interstitial wall space was not part of the demised premises, there can be no question that the tenant's bedroom's electrical outlet was a part of the demised premises. The tenant, JO-ANN CAMPBELL, even paid for her electricity directly to the utility company; Defendants were not involved in the providing of electricity to the apartment (Lease, Appendix A, p. 4, part III.A.3.). As the fire allegedly originated inside the tenant's electrical outlet, which was attached to the tenant's bedroom wall and was present for use by the tenant, there can be no trespass.

In sum, as a matter of law the entire premises -- including the inside and outside walls, and the subject electrical outlet -- were demised to MS. CAMPBELL. The fire therefore originated on her premises. There is no basis in fact or law for finding a "physical intrusion".

The case law and principles invoked by Plaintiffs in an attempt to avoid that result are inapposite. Moreover, when

properly analyzed they actually underscore the correctness of Defendants' position.

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